

13-20-00261-CV

In The Court Of Appeals FILED IN
13th COURT OF APPEALS
CORPUS CHRISTI/EDINBURG, TEXAS
Thirteenth District Of Texas At Corpus Christi 9/4/2020 12:45 PM
KATHY S. MILLS
Clerk

CERTAIN UNDERWRITERS AT LLOYD’S OF LONDON SUBSCRIBING TO
POLICY NO. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. &
75 and Sunny Hospitality d/b/a Fairfield Inn & Suites,

Plaintiff-Appellant

v.

MAYSE & ASSOCIATES, INC.,

Defendant-Appellee.

**OPPOSITION BY MAYSE & ASSOCIATES, INC. TO APPELLANT’S
MOTION TO RETROACTIVELY EXTEND TIME
TO FILE NOTICE OF APPEAL
AND
AND REPLY TO UNDERWITERS’ RESPONSE IN OPPOSITION TO
MAYSE’S MOTION TO DISMISS UNDERWRITERS’ APPEALS**

1. On September 3, 2020, Mayse & Associates, Inc. (“Mayse”) received the Court’s letters dated September 3, 2020 to Underwriters’ counsel advising that the following District Court’s orders are not appealable: Order denying Plaintiff’s Motion for New Trial, Motion to Modify the Judgment and Motion for Reconsideration signed August 24, 2020 (13-20-00376-CV) and the Order granting Mayse’s Motion to Strike the Supplemental Affidavit of Mr. Itle attached to Underwriter’s Motion for New Trial, Motion to Modify the Judgment and Motion

for Reconsideration signed August 24, 2020 (13-20-00375-CV) are not appealable. There is no need at this time for Mayse to comment further on those appeals.

2. With regard to appeal **13-20-00261-CV**, Underwriters argue that they are entitled to an extension to retroactively file a timely notice of appeal because: it was unclear to them whether the filing of their post-trial motions would affect the appellate filing date; another defendant's motion to dismiss based upon the certificate of merit law had not been heard; and they did not know that expedited appeals taken pursuant to the Certificate of Merit Law must be filed twenty (20) days after the District Court's ruling on the Certificate of Merit motion. This was not a miscalculation. A miscalculation would be if it knew of the twenty-day period, but mistakenly calendared the event in twenty-nine (29) days. Underwriters' authorities do not support the proposition that it should be allowed to ignore the Texas Rules of Appellate Procedure.

3. To support their position, Underwriters cite: *Martinez v. Navy Army Community Credit Union*, No. 13-19-00645-CV (Tex. Ct. App. - Corpus Christi-Edinburg 1/16/20) (2020 W.L. 241970). *See also Verburgt v Dorner*, 959 S.W.2d 615, 617-618 (Tex. 1997); *See Jordan and Associates v Wells*, No. 01-14-009920CV (Tex. Ct. App. - Houston 1st Dist. 7/30/15) (2015 W.L. 4591786).

4. In *Verburgt*, the appellant stated that he did not file a cost bond on time because he mistakenly believed that he had complied with the rule in question, 959

S.W.2d at 615. The Supreme Court remanded the case to the District Court “to determine whether *Verburgt* offered a reasonable explanation for his failure to timely file his bond. *See* TEX.R.APP. 41(a)(2).” 959 S.W.2d at 617. After remand, the parties settled

PER CURIAM.

*1 The parties have filed a joint motion, stating that they have fully resolved and settled all issues in dispute. They request that the trial court’s judgment be reversed, without regard to the merits, and that the cause be remanded to the trial court for entry of a judgment in conformity with their settlement agreement. The parties have also requested that our mandate issue immediately. *See* TEX.R.APP.P. 18.1(c).

The motion is granted, and the mandate will issue immediately. The judgment of the trial court is reversed, without regard to the merits, and the cause is remanded to the trial court for entry of a judgment in conformity with their settlement agreement. Costs of appeal are taxed against the parties who have incurred them.

1998 WL 301679

There is no reported record of whether the trial court decided whether *Verburgt* ever offered a reasonable explanation for his failure to timely file his bond. Thus, *Verburgt* did not get a pass because he made a late filing; he still had to prove that a reasonable explanation for his failure to timely file his bond.

5. *In Martinez v Navy Army Community Credit Union*, No. 13-19-00645-CV (Tex. Ct. App. - Corpus Christi-Edinburg 1/16/20) (2020 W.L. 241970), this

court dismissed an appeal because the appellant failed to timely appeal and failed to offer a reasonable explanation for the late filing.

A motion for extension of time is necessarily implied when an appellant, acting in good faith, files a notice of appeal beyond the time allowed by Rule 26.1, but within the fifteen-day grace period provided by Rule 26.3 for filing a motion for extension of time. *See Verburgt v. Dorner*, 959 S.W.2d 615, 617-18, 619 (1997) (construing the predecessor to Rule 26). **However, appellant must provide a reasonable explanation for the late filing: it is not enough to simply file a notice of appeal.** *Id.*; *Woodard v. Higgins*, 140 S.W.3d 462, 462 (Tex. App. Amarillo 2004, no pet.); *In re B.G.*, 104 S.W.3d 565, 567 (Tex. App. Waco 2002, no pet.).

2020 W.L. 241970 (emphasis added)

6. In *Industrial Services USA, Inc. v. American Bank B.N.*, 17 S.W. 3d 358 (Tex. App. Corpus Christi-Edinburgh 2000, no pet.), this court held that “*Verburgt’s* judicially-created implication does not extend to the requirement that the movant provide a reasonable explanation why an extension is necessary; it is still necessary to demonstrate facts that reasonably show a need to extend the time for filing the notice of appeal.”

In *Verburgt v. Dorner*, 959 S.W.2d 615 (Tex.1997), the Texas Supreme Court held that “a motion for extension of time is necessarily implied when an appellant acting in good faith files a bond beyond the time allowed by Rule 41(a)(1), but within the fifteen-day period in which the appellant would be entitled to move to extend the filing deadline under Rule 41(a)(2).” *Id.* at 617. Although *Verburgt* was decided under the former rules of appellate procedure, the exception has been held applicable to the filing of the notice of appeal under the current rules. *Smith v. Houston Lighting & Power Co.*, 7 S.W.3d

287, 288 (Tex. App.—Houston [1st Dist.] 1999, no pet. h.); Kidd v. Paxton, 1 S.W.3d 309, 310 (Tex. App.—Amarillo 1999, no pet. h.).

However, this judicially-created implication does not extend to the requirement that the movant provide a reasonable explanation why an extension is necessary; it is still necessary to demonstrate facts that reasonably show a need to extend the time for filing the notice of appeal.

Jones v. City of Houston, 976 S.W.2d 676, 677 (Tex.1998) (applying the *Verburgt* rule to late-filed pauper’s affidavit in lieu of appeal bond); Smith, 7 S.W.3d at 288–89; Kidd, 1 S.W.3d at 310; Coronado v. Farming Technology, Inc., 994 S.W.2d 901, 901–02 (Tex. App.—Houston [1st Dist.] 1999, no pet.); Miller v. Greenpark Surgery Center Assoc., Ltd., 974 S.W.2d 805, 807–08 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

Appellant has failed to provide this Court with facts that reasonably show the need to extend the time for filing the Notice of Appeal. We hold this appeal was not timely perfected and dismiss it for want of jurisdiction.

17 S.W. 3d 358 (emphasis added)

7. In *Jordan and Associates v Wells*, No. 01-14-009920CV (Tex. Ct. App. - Houston 1st Dist. 7/30/15) (2015 W.L. 4591786 *1), The Houston Court of Appeals allowed an appellant an extension of time based upon an affidavit from counsel that it had “miscalculated the date necessary to file the notice of appeal.”

8. In their motion to retroactively extend their time to appeal the District Court’s June 11, 2020 ruling, Underwriters present the following explanations for their filing late (followed by Mayse’ response):

- A. It was unclear whether filing its post-trial motions would affect the filing date.

Mayse's Response - TRAP 28.1 provides:

28.1. Accelerated Appeals

(a) *Types of Accelerated Appeals*. Appeals from interlocutory orders (when allowed by statute), appeals in quo warrant proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected within less than 30 days after the date of the order or judgment being appealed are accelerated appeals.

(b) *Perfection of Accelerated Appeal*. Unless otherwise provided by statute, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25.1 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3. **Filing a motion for new trial, any other post-trial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.**

(emphasis added)

- B. Another defendant, DCI had filed a COM Motion to Dismiss that had not been heard.

Mayse's Response - This is not a good excuse, and it is also contrary to their last explanation. So, they knew about the twenty-day period but did not appeal because they were waiting for a ruling on DCI's motion?

- C. They miscalculated - they were unaware that they needed to appeal in twenty days.

Mayse's Response - As articulated in Underwriters' motion, the TRAP twenty-day appellate period is clear.

In conclusion, Underwriters appeal should be dismissed as untimely because they have not offered a suitable explanation for not timely filing their appeal of the District Court's order granting Mayse's motion for dismissal for failure to comply with the Texas Certificate on Merit Law.

Respectfully submitted,

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/s/ Stanhope B. Denegre

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***COUNSEL FOR APPELLEE
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CERTIFICATE OF SERVICE

Pursuant to Rule 21 of the Tex. R. Civ. P., I hereby certify that on the 4th day of September 2020, a copy of the foregoing document was served upon all attorneys of record.

/s/ Stanhope B. Denegre

Stanhope B. Denègre

Automated Certificate of eService

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Associated Case Party: Certain Underwriters at Lloyd's of London Subscribing to Policy No. NAJL05000016

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Associated Case Party: KK Builders, LLC, D'Amato Conversano, Inc d/b/a DCI Engineers, 1113 Structural Engineers, PLLC and Mayse & Associates, Inc.

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